THE
MADRAS LAW JOURNAL

II] OCTOBER [1941

NEED FOR AMENDING R. 12-B OF THE HIGH COURT APPELLATE SIDE RULES.

Rule 12-B of the Rules of the High Court in its appellate jurisdiction states:

"The time prescribed under these rules for the doing of any act shall be extended only on application made by a stamped petition and the Registrar shall, whenever he considers it necessary, be at liberty to call for the production of a certificate showing the dates on which the acts prescribed by the rules were done or should have been done, which certificate will be granted by the Deputy Registrar upon payment of a fee of Rs. 2 in Court-fee stamps".

In so far as the rule requires the payment of a fee of Rs. 2 for the certificate the provision seems to be of doubtful validity and the production of a certificate which is now almost invariably required seems to be altogether superfluous and unnecessary in many cases.

The Rules of the High Court in its appellate jurisdiction are issued under the powers vested in the High Court by the Government of India Act, the Letters Patent, the Code of Civil Procedure and the Court-Fees Act. They depend for their validity on their being in accordance with the provisions of the statutes by which the rule-making power is created both with reference to their substance as well as with reference to their sanction[1]. Under S. 223 of the Government of India Act, 1935, the High Court's power to make rules of Court shall be the same as immediately before the 1st April, 1937, namely, the power it had under S. 108 of the Government of India Act (5 and 6 Geo. V, c. 61). The rules contemplated by that section were with reference to the exercise by one or more judges or by division Courts constituted by two or more judges of the original and appellate jurisdiction vested in the Court. Cl. 37 of the Letters Patent issued on the 28th December, 1865 empowers

1. Craies, Statute Law, Third Edn., p. 259.

the High Court "to make rules and orders for the purpose of *regulating* all proceedings in civil cases" and the High Court was to be guided "in making such rules and orders *as far as possible* by the provisions of the Code of Civil Procedure". S. 122 of the latter Code confers power on the High Courts to "make rules *regulating* their own procedure", and by such rules to annul, alter or add to all or any of the rules in the First Schedule. S. 128 provides that such rules shall not be inconsistent with the body of the Code, but subject thereto may provide for any matter relating to the procedure of Civil Courts. S. 20 of the Court-Fees Act gives power to the High Court to make rules as to processes and the fees and costs chargeable in connection therewith. Broadly speaking, the rule-making power of the High Court is to be exercised under these enactments for (*i*) regulating procedure and (*ii*) prescribing fees for processes.

It is doubtful whether a power to "regulate" will include a power to levy a fee. "Regulate" according to the Oxford Dictionary signifies "to control by rule, subject to restrictions, moderate, adapt to requirements." As has been authoritatively pointed out in another context for another purpose, "it does not seem possible to stretch this meaning to include levying fees."[1] Unless the power had been expressly granted, the power to regulate will not include the power to impose a fee. As already remarked the only power conferred by the Court-Fees Act to prescribe fees by rules is as regards processes only. The imposition of a fee of Rs. 2 therefore for a certificate under rule 12-B of the appellate side rules does not seem to be within the rule-making power given to the High Court by the Government of India Act, the Letters Patent, the Civil Procedure Code and the Court-Fees Act, and seems to be unwarranted.

The Registrar's certificate is for the purpose of indicating the dates on which the several acts prescribed by the rules were done or ought to have been done in connection with the applications referred to in the rules. If an affidavit containing these dates is filed along with the petition seeking an extension of time to do the acts prescribed, surely it will be an unreasonable exercise of the discretion granted to the Registrar under r. 12-B to insist even in such a case on the production of a certificate. In this connection it is pertinent to draw attention to P. Dis. No. 840 of 1932 prescribing the duties to be performed by the Registrar, the Deputy Registrar and the Assistant Registrar, in regard to matters concerning payment of printing charges, pointing out portions for printing, lodgment and batta, and batta other than the initial batta,

1. *M. S. Aiyar & Co.*, v. *Srinivasalu Naidu*, (1941) 2 M.L.J. 145, 147.

It is absolutely essential that the directions should be construed by the Office not as taking away the discretion vested in the Officer under r. 12-B, but merely as allocating the work among the different officers for the purposes specified. Thus for instance in regard to printing charges, under P. Dis. No. 840 of 1932 the Deputy Registrar has to ask for a certificate before an application for extension of time to pay printing charges can be ordered. This cannot by any means take away the discretion to call for such certificate vested in the Officer by r. 12-B. To hold otherwise will be unreasonable. The amount of printing charges, the dates on which they were called for, and the dates when they should be paid, all appear on the Bills issued by the Office and if necessary can find corroboration from the affidavit filed in support of the application. In any event, it may be sufficient to insist that the bill itself be filed along with the affidavit. Where then is the necessity in such a case for the production of a certificate at a cost of Rs. 2? The position is equally true regarding applications for extension of time to point out portions or in respect of lodgment and batta.

In this connection r. 79 of the Appellate Side Rules may also be considered. Sub-r. 2 states that a Registrar's certificate shall be produced where an application for extension of time for the preparation of the record is filed in the manner prescribed by O. 41-A, r. 3 (2) of the Civil Procedure Code. According to r. 73 of the Appellate Side Rules the record includes both pleadings and documents. Extension of time for preparing the record may be necessary due to either or both the above not being printed or printing not having been applied for. Be the cause what it may, there is no reason why separate applications with separate Registrar's certificates should be filed under r. 79 in regard to the different parts of the record. There seems to be no warrant for construing the rule as requiring more than a single application for extension of time in regard to the entire record for its preparation. Under r. 12 (29) the Registrar is given power to extend the time prescribed by r. 79 for a period not exceeding 10 days and by r. 12-A (2) (*i*) the Registrar is empowered to hear an application for extension of time beyond 10 days of the time prescribed by r. 79. Clearly the application contemplated by r. 12 (29) and r. 12-A (2) (*i*) is one for extension of time to pay the amounts of the estimate to prepare the record *i.e.*, to pay the pleadings and the documents bills—see r. 79 (1)—and is different from the application contemplated by r. 79 (2) which deals with extension of time to prepare the record. In the case of applications to extend time for payment of the bills there can be as

already pointed out no reason to insist upon the production of a Registrar's certificate.

If only it is remembered that the practice of obtaining a Registrar's certificate originated some decades back when judges themselves dealt with all applications for extension of time, it is now but a needless relic of antiquity when the Registrars themselves are performing the function and when there is a well systematised practice of issuing bills or memos containing all particulars or of posting matters in the notice board giving full particulars sufficiently in advance.

In these circumstances it is highly necessary that r. 12-B should be either repealed or suitably amended having regard to the doubts regarding the legality of the fee prescribed by it and to the unnecessary hardship which the insistence on the production of the certificate is apt to cause in a good number of cases.

APPLICABILITY OF O. 21, Rr. 18 TO 20 TO MORTGAGE DECREES WHERE PERSONAL REMEDY IS BARRED.

BY

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O. 21, r. 20 makes the provisions contained in O. 21, rr. 18 and 19 dealing with execution in case of cross decrees and execution in case of cross claims under the same decree respectively, applicable to decrees for sale in enforcement of a mortgage or charge. The case-law on the subject is not much, but unfortunately there is a conflict of judicial opinion in our High Court as regards the scope of the rule—see *Venkata Reddi* v. *Dorasami Pillai*[1] and *Nagor Damodar Shanbhogue* v. *Gange*[2].

In *Krishnan* v. *Venkatapathi*[3], a case decided before the present O. 21, r. 20 became law, the question arose whether a simple decree for money could be set off against a decree for the recovery of money by the sale of certain lands. It was held that a decree for the recovery of money by sale of lands was essentially a decree for money, and therefore the amount due under the decree for money could be reduced. Benson and Moore, JJ., purported to rest their decision on a prior Full Bench decision of the Court in *Vaidhianadasami Aiyar* v. *Somasundram Pillai*[4].

1. (1932) 63 M.L.J. 722: I.L.R. 56 Mad. 339.
2. (1938) 1 M.L.J. 417.
3. (1905) I.L.R. 29 Mad. 318.
4. (1904) 15 M.L.J. 126: I.L.R. 28 Mad. 473.

In the Full Bench decision, the suit was on a mortgage, in which *there was a personal remedy against the mortgagors* as also a remedy against the property. The question referred to the Full Bench was whether S. 258 (now O. 21, r. 2) Civil Procedure Code, has any application to a case like the present, so long as the remedy against the mortgaged property remains unexhausted. The substantial question involved in the case was whether the judgment-debtor could set up as a bar to the execution of a mortgage decree an adjustment of the decree between himself and the decree-holder. Hence anything in that decision with reference to a case where there was no personal remedy must necessarily be *obiter*. There is, as observed in a later decision a lot of difference between a case where the personal remedy exists, and one where it does not, in considering whether a decree is or is not one for the payment of money, that is, a money decree.

In *Nagarmal* v. *Ramchand*[1], the Allahabad High Court held that the mere fact that one of the decrees is a mortgage decree, *without any other reason*, is not enough to refuse a set off under O. 21, r. 20. Here too there was no question of a subsisting personal remedy. In another Allahabad case *Sheo Shankar* v. *Chunilal*[2], the set off was claimed against persons who were purchasers of a portion (considerable part) of the mortgaged property and who had been impleaded as such purchasers (*vide* the last two lines of the judgment). Clearly the subsequent purchasers were under no personal liability and hence a set off was refused.

The abovesaid two Allahabad decisions are important because these two along with *Burma Oil Company* v. *Ma Tin*[3] and *Venkata Reddi* v. *Dorasami Pillai*[4], will, according to Sir George Rankin in delivering the judgment of the Privy Council in a later case *Hazariram Marwari* v. *Bansidhar Dhandhania*[5], "afford assistance to the Board and to the Courts in India" (see *Hazariram Marwari* v. *Bansidhar Dhandhania*[5]). The case in *Burma Oil Company* v. *Ma Tin*[3], discusses the question directly. In that case the appellants had no personal remedy against the respondents. Heald, J., in delivering the judgment of the Bench observed: "I find it difficult to hold that a mortgage decree for the sale of the mortgaged property while there is no remedy except against the property, and where there is no obligation on the part of the mortgagors personally to pay any sum of money, is a decree for the payment of money". This view looks more reasonable, for to hold otherwise,

1. (1910) 33 All. 240.
2. (1916) 38 All. 669.
3. (1929) I.L.R. 7 Rang. 505.
4. (1932) 63 M.L.J. 722: I.L.R. 56 Mad. 339
5. (1937) 1 M.L.J. 254: I.L.R. 16 Pat. 127 (P.C.).

would be to give the mortgagee decree-holder, (who institutes and obtains a decree after the personal remedy is barred) more than what the decree entitles him to recover, simply by reason of a decree for, say, costs in favour of the mortgagors being passed.

In *Venkata Reddi* v. *Dorasami Pillai*[1], the final decree directed a sale of the mortgaged property and provided further that *if there was any deficiency it should be paid by the plaintiff*, that is, there was a personal decree against the plaintiff because as Ramesam, J., (sitting with Pakenham Walsh, J.) observed at page 724 "by saying he is liable for the deficiency that may remain after the sale, the true character of his liability is known." Therefore the question as to whether a set off could be allowed, in cases where there was no personal remedy did not arise in that case. However, the decision is important in that it affords guidance according to Sir George Rankin in *Hazariram Marwari* v. *Bansidhar Dhandhania*[2]. The following observations in *Venkata Reddi* v. *Dorasami Pillai*[1], are worth noting. "But I will observe that even in a decree for sale it may be that the property is worth much less than the amount of the decree and the mortgagor may find it convenient to allow the property to be sold, and in such a case if he is not liable for the deficiency, *it cannot be said that there is any decree for money against him*". This decision also quotes with approval *Burma Oil Company* v. *Ma Tin*[3] referred to *supra*.

As against this, we find another decision of our High Court in *Nagor Damodar Shanbhogue* v. *Gange*[4]. This decision doubts the correctness of the principle laid down in *Venkata Reddi* v. *Dorasami Pillai*[1], but in leaving the question open, actually decides that even though one decree is executable only against the property and the other decree is personally executable, still they can be set off against each other under the provisions of O. 21, r. 19. Reliance seems to be placed on *Sankara Menon* v. *Gopala Pattar*[5] and *Hazariram Marwari* v. *Bansidhar Dhandhania*[2]. But it will be seen that in *Sankara Menon* v. *Gopala Pattar*[5] there was a decree directing the plaintiff to pay into Court or to the defendant the mortgage money, and there was also a decree in favour of the defendants in and by which the defendants should pay to the plaintiff some costs. There was thus a personal liability against both the parties by virtue of the decree of the Court. As such that decision cannot govern a case where there was no personal liability.

1. (1932) 63 M.L.J. 722: I.L.R. 56 Mad. 339.
2. (1937) 1 M.L.J 254: I.L.R. 16 Pat. 127 (P.C.)
3. (1929) I.L.R. 7 Rang. 505.
4. (1938) 1 M.L.J. 417.
5. (1899) I.L.R. 23 Mad. 121.

The decision of the Privy Council in *Hazariram Marwari* v. *Bansidhar Dhandhania*[1], is also no direct authority though that was a case where a decree for sale in enforcement of a charge was allowed to be set off against a decree for mesne profits. The observations at the end of page 259 in (1937) 1 M.L.J. 254 are quoted at page 422 (1938) 1 M.L.J., namely, "the words of r. 20 'decrees for sale in enforcement of a mortgage or charge', cannot be restricted to personal judgments such as may be given under O. 34, r. 6." But Venkataramana Rao, J., in delivering the judgment of the Bench, has not given due weight to certain other lines in the same judgment at page 260, namely, "As it was held by the judgment in the suit in which the final decree for sale was passed that the *right* of the present respondents 1 to 16 to a personal judgment subsisted and was not barred, their Lordships do not find it necessary either to examine this question afresh in these execution proceedings, or to embark upon a discussion of the difficulties that may arise if a mortgage decree be set off against a money decree in the absence of any personal liability on the part of the mortgagor who holds the money decree. Mr. Dunne for the respondents contested the view taken in the High Court as to personal liability being a condition of set off, but as this important question does not here arise for decision and calls for careful discussion, their Lordships do not think fit to pronounce upon it. In so saying they do not intend to prejudice the view taken by the High Court. On the contrary they would be slow to give effect to a rule of set off so as to alter substantive rights or to produce consequences beyond the scope of an intention to avoid circuity of proceedings. Whenever the matter arises for decision the observations of the learned Judge (Noor, J.) and his discussion of the authorities (*Nagarmal* v. *Ramchand*[2] *Sheo Shankar* v. *Chunilal*[3], *Burma Oil Co.* v. *Ma Tin*[4] also *C.F. Venkata Reddi* v. *T.V. Doraisami Pilla*[5]) will afford assistance to the Board and to the Courts in India."

Thus it will be seen that a right to a personal decree subsisted in the Privy council case, and hence it is respectfully submitted that *Nagor Damodar Shanbhogue* v. *Gange*[6] requires reconsideration, having regard to the (*a*) preponderence of authority *contra*, and (*b*) non-applicability of the very decisions relied on in *Nagor Domodar Shanbogue* v. *Gange*.[6]

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1. (1937) 1 M.L.J. 254: I.L.R. 16 Pat. 127 (P.C.).
2. (1910) 33 All. 240
3. (1916) 38 All 669.
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5. (1932) 63 M.L.J. 722: I.L.R. 56 Mad. 339.
6. (1938) 1 M.L.J. 417.

JOTTINGS AND CUTTINGS.

J. P. Benjamin.—Among the notable figures who cross the pages in Ashton's work is that remarkable man Judah Philip Benjamin who had filled the office of Attorney-General in the Confederate States but for political reasons had ere long to flee America for England, where he found a new home and where he speedily built up a huge practice. It has been said that just as some of Sir Samuel Romilly's replies were as valuable to the practitioner as were Lord Eldon's judgments in the same case, so Benjamin's arguments were equally valuable. Surely the most remarkable tribute to his greatness as a sound lawyer was that which related to an important question in which the Bank of England was the client. Sir Hardinge Gifford, Bowen and Benjamin were asked to advise the Bank. Gifford and Bowen gave it as their opinion that the Bank was right in the view it took, while Benjamin declared that the Bank was wrong. On this we are told that the Bank settled.

His Persistence.—In the year 1867 a case came before Vice-Chancellor James—*United States* v. *McRae*—in which it was sought to compel the defendant to render an account of all property which had come into his hands as agent for the Confederacy. Counsel for the plaintiff had been heard and it looked as if he was to succeed when Benjamin rose, following his leaders, and in a raucous voice began thus : " Notwithstanding the somewhat off-hand and supercilious manner in which this case has been dealt with by my learned friend Sir Roundell Palmer, and to some extent acquiesced in by my learned leader Mr. Kay, if you will only listen to me I pledge myself you will dismiss this case with costs," and that in the end the Vice-Chancellor did. That is said by one of his biographers to have been his first case in our courts.

His Humour.—When we try to call up a mental picture of Benjamin we are apt to think of him as a brusque personage with an excruciating accent and as pugnacious as the celebrated dog of which Dr. John Brown told us that its owner accounted for its preternatural gravity on the ground that "it could never get eneuch o' fechtin." Benjamin was above all things pugnacious in the interest of the client whose cause he had been briefed to support, but that he was not deficient in a grim sort of humour became apparent when, on being asked what his rule was as to fees, he replied thus : " First, I charge a retainer ; then I charge a reminder ; next I charge a refresher ; and then I charge a finisher !" This no doubt was his fun, but that he made a very large income at the English bar is undoubted. Mr. Roland Williamson in his pleasant little book on " The Law Library, in the Capitol, Washington" says that in 1880 Benjamin's income was stated to be 80,000 dollars. *L.T., 1941, pp. 23 and 24.*